IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. FELIPE GABRIEL SAMANIEGO LUGO, Petitioner.	2 CA-CR 2009-0105-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR-200700606

Honorable Stephen M. Desens, Judge

REVIEW GRANTED; RELIEF DENIED

Felipe Lugo — Phoenix
In Propria Persona

V Á S Q U E Z, Judge.

¶1 Petitioner Felipe Lugo seeks review of the trial court's summary dismissal of his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb the court's ruling unless it has clearly abused its discretion. *See State v.*

Swoopes, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Although we grant review, we deny relief.

Facts and Procedural Background

¶2 On August 23, 2007, Lugo received treatment at a Douglas hospital for alcohol withdrawal. The following day, he stole a truck at gunpoint and fled to Mexico. Lugo was charged with armed robbery, theft of a means of transportation, and aggravated assault. Pursuant to a plea agreement, he pled guilty to attempted armed robbery and attempted theft of a means of transportation. Before sentencing, Lugo filed a motion to withdraw from the plea agreement and dismiss counsel.[1] The trial court denied the motion, accepted and entered Lugo's guilty plea, and sentenced him to concurrent, slightly aggravated prison terms of eight years on the armed robbery charge and five years on the theft charge.

¶3 Lugo filed a petition for post-conviction relief pursuant to Rule 32, claiming the trial court erred in denying his motion to withdraw from the plea agreement and alleging his trial counsel had been ineffective. Lugo contended he was entitled to assert a "voluntary intoxication" defense, based on his assertion that medication he had received at the hospital caused him to hallucinate or lose consciousness at the time he committed the offenses, and that he was prejudiced by counsel's failure to interview witnesses and obtain medical and other records supporting such a defense. He also argued the court erred in denying his motion for a competency evaluation pursuant to

[1]Lugo's counsel also filed a motion to withdraw, which the trial court granted at the conclusion of the sentencing hearing.

Rule 11, Ariz. R. Crim. P., that his conviction for "armed robbery and theft of the same vehicle at the same time" violated his double jeopardy rights, and that his extradition from Mexico violated the "Vienna Conventions." The court found Lugo had not raised a material issue of fact or law that would entitle him to relief on any of his claims and dismissed the petition.

Discussion

Presentence Interview and Report

¶4 In his petition for review, Lugo first urges this court to remand the case to the trial court for resentencing because the trial court erred in denying his request for a presentence interview with the probation officer. At the sentencing hearing, Lugo requested a continuance so that he could be interviewed by the probation officer. The court denied the request after finding the probation officer had attempted to meet with Lugo for the purpose of conducting a presentence interview, but Lugo had refused to participate because he intended to withdraw his guilty plea. "A defendant has a constitutional right not to speak with a probation officer for sentencing purposes." *State v. Cornell*, 179 Ariz. 314, 333, 878 P.2d 1352, 1371 (1994). And, the record supports the court's finding that Lugo had the opportunity to speak with the probation officer but refused to do so. Lugo thus waived his right to a presentence interview. *See State v. Chaney*, 141 Ariz. 295, 311, 686 P.2d 1265, 1281 (1984) (finding waiver of right to submit to presentence interview by refusing to talk to probation officer on advice of counsel).

¶5 To the extent Lugo additionally contends he is entitled to be resentenced because the trial court failed to order and consider a presentence report in determining an appropriate sentence, he did not raise this issue below. Consequently, he has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (failure to object to alleged trial court error forfeits review for all but fundamental error). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.*, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). The defendant has the burden of showing both that the error was fundamental and that it caused him prejudice. *Id.* ¶¶ 19-20.

¶6 Rule 26.4(a), Ariz. R. Crim. P., states that a trial court "shall require a pre-sentence report in all cases in which it has discretion over the penalty to be imposed." Assuming, without deciding, that the trial court erred in failing to order a presentence report, Lugo cannot show he was prejudiced by the court's failure.[2] *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. "The parties may negotiate concerning, and reach an agreement on, any aspect of the case." Ariz. R. Crim. P. 17.4(a). Here, the parties did not simply agree upon a sentencing range for the trial court to consider, they stipulated to the exact prison terms Lugo would receive.

[2]Based on our review of the record, we conclude the trial court adequately "consider[ed] the merits" of the plea agreement "in light of the circumstances of the case" and exercised its discretion with regard to accepting or rejecting the agreement. *Espinoza v. Martin*, 182 Ariz. 145, 147, 894 P.2d 688, 690 (1995).

¶7 "Once the parties reach an agreement and the trial court accepts it, the trial court may not change the agreement's terms without giving both the state and the defendant the opportunity to withdraw." *State v. Oatley*, 174 Ariz. 124, 125, 847 P.2d 625, 626 (App. 1993). Here, the trial court accepted the plea in its entirety. Lugo thus is bound by the terms of his plea agreement. Even had the trial court reviewed a presentence report before sentencing Lugo, it could not have affected the sentence to which he stipulated and the trial court agreed to impose.

Waiver of Rule 32 claims

¶8 Lugo next asks this court to consider the multiple claims he raised in his Rule 32 petition. However, a plea of guilty is a reliable admission of factual guilt that "renders irrelevant those constitutional violations . . . which do not stand in the way of conviction if factual guilt is validly established." *Menna v. New York*, 423 U.S. 61, 63 n.2 (1975).

¶9 We therefore do not consider his claims relating to his putative "voluntary intoxication" defense, his right to a competency evaluation, or his extradition. *See State v. Diaz*, 121 Ariz. 16, 19, 588 P.2d 309, 312 (1978) (waiver of trial court's failure to rule on motion to suppress evidence before accepting guilty plea); *State v. Hostler*, 109 Ariz. 212, 214, 507 P.2d 974, 976 (1973) (defendant may not raise issues concerning potential insanity defense after accepting guilty plea); *State v. Alford*, 98 Ariz. 124, 128, 402 P.2d 551, 554 (1965) (ability to challenge voluntariness and admissibility of confessions waived by guilty plea); *State v. Lopez*, 99 Ariz. 11, 13, 405 P.2d 892, 893 (1965) (illegal

search and seizure issues waived by guilty plea). Nor do we consider his claims of ineffective assistance of counsel except to the extent they relate to the voluntariness of his plea. *See State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993) (by entering guilty plea defendant waives all nonjurisdictional defects, including claim of ineffective assistance of counsel, except those that relate to validity of plea).

Double Jeopardy

¶10 Lugo argues that his convictions for "armed robbery and theft of the same vehicle at the same time" violated his double jeopardy rights.[3] "The Double Jeopardy Clauses of the United States and Arizona Constitutions protect criminal defendants from multiple convictions and punishments for the same offense." *State v. Ortega*, 220 Ariz. 320, ¶ 9, 206 P.3d 769, 772 (App. 2008). Thus, to prevail on his double jeopardy claim, Lugo must show the two convictions were "for the same offense." *See id*. "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *see Lemke v. Rayes*, 213 Ariz. 232, ¶ 16, 141 P.3d 407, 413 (App. 2006).

[3]This argument is not waived by Lugo's plea because a double jeopardy violation would "stand in the way of conviction [even] if factual guilt [were] validly established." *See Menna*, 423 U.S. at 63 n.2; *State v. Millanes*, 180 Ariz. 418, 420, 885 P.2d 106, 108 (App. 1994) ("a defendant does not waive a double jeopardy claim by entering into a plea agreement").

¶11 Lugo was convicted of armed robbery and theft of a means of transportation pursuant to A.R.S. §§ 13-1904 and 13-1814, respectively. Unlike a conviction for theft of a means of transportation, a conviction for armed robbery requires proof that the defendant or an accomplice was armed with, used, or threatened to use, a deadly weapon or simulated deadly weapon. § 13-1904. A conviction for theft of a means of transportation requires proof that the defendant controlled another person's means of transportation; a conviction for armed robbery has no such requirement. §§ 13-1904, 13-1814. Because each offense therefore requires proof of a fact which the other does not, they are not the "same offense," and Lugo could be convicted of both without violating the Double Jeopardy Clause. *See Lemke*, 213 Ariz. 232, ¶ 16, 141 P.3d at 413; *see also State v. Lee*, 185 Ariz. 549, 560, 917 P.2d 692, 703 (1996) (providing for concurrent sentences for convictions for theft of an automobile and armed robbery arising from same act). And because both offenses arose from the same act, the court appropriately sentenced Lugo to concurrent sentences pursuant to A.R.S. § 13-116.[4] *See Lee*, 185 Ariz. at 560, 917 P.2d at 703.

Voluntariness of Plea

¶12 Lugo maintains his guilty plea was involuntary because it was induced by counsel's "acts and omissions [that] caused counsel's performance to fall below an objective standard of reasonableness." To state a colorable claim of ineffective

[4]This section provides that "[a]n act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." § 13-116.

assistance of counsel, a defendant must show that counsel's performance fell below objectively reasonable standards and the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). And, "to state a colorable claim, [an] allegation that a petitioner would not have pleaded guilty but for counsel's deficient performance must be accompanied by an allegation of specific facts which would allow a court to meaningfully assess why that deficiency was material to the plea decision." *State v. Bowers*, 192 Ariz. 419, ¶ 25, 966 P.2d 1023, 1029 (App. 1998). Here, Lugo specifically asserts his counsel erred in advising him "he had no defense to the charges and that he would be sentenced to 15-20 years if he went to trial."

¶13 First, even assuming counsel advised Lugo that he had no viable defense to the charges, this does not necessarily render Lugo's plea involuntary. At the change of plea hearing, in providing a factual basis for the plea, counsel stated Lugo's contention that Lugo was hallucinating and believed he was being chased when he robbed the victim by stealing her vehicle at gunpoint. The day before he committed the offenses Lugo had been treated at a hospital for "alcohol withdrawal" and was given two milligrams of the drug "Adevan intravenously."[5] However, at the presentencing hearing on Lugo's motion to withdraw from the plea agreement, counsel stated that the recommended daily dosage of "Adevan" is up to ten milligrams and "[t]here is the problem of course, with the smaller dosage [Lugo had actually been given] and the [approximately twelve-hour] time period between the time he was given this medication and the time this crime occurred."

[5]The trial transcript below spelled this medication phonetically. We believe the parties were referring to the medication Ativan.

¶14 In denying Lugo's motion to withdraw his guilty plea, the trial court stated that the defense had "always been known, always been discussed, this Court has made rulings about it. So there's absolutely no newly discovered evidence before this Court as of this date, and the record should be clear we're hashing out the same set of facts . . . ." Indeed, as the court also observed, Lugo's counsel requested and the court appointed an investigator and toxicologist to assist the defense. Thus, whatever advice counsel eventually provided as to the viability of Lugo's defense, the record demonstrates that counsel had fully investigated and explored that potential defense—and that Lugo was aware of the existence of it. The record simply does not support Lugo's claim that his counsel erred in advising him he had no defense.

¶15 Similarly, there is no merit to Lugo's argument that counsel erroneously advised him he was facing a potential prison term of fifteen to twenty years if he went to trial and a jury found him guilty. "[W]hen a defendant has pleaded guilty based on counsel's patently erroneous advice that he faces a more severe sentence than that actually possible, the plea was entered involuntarily." *State v. Ysea*, 191 Ariz. 372, ¶ 17, 956 P.2d 499, 504 (1998). But here, counsel's statement was an accurate estimate of the sentences Lugo could have received if convicted on the original charges, one class two and two class three felonies, with one prior felony conviction. *See* A.R.S. § 13-703(I).[6] We therefore find no merit to Lugo's argument.

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[6]Significant portions of the Arizona criminal sentencing code have been renumbered, effective "from and after December 31, 2008." *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because the renumbering included no

¶16 Lugo's further contentions concerning the voluntariness of his plea likewise are not supported by the record. Although he asserts that counsel "never read and discussed [the] plea" with him and that he was "coerced" into signing it, his responses to the trial court at the change-of-plea hearing confirmed that he had reviewed the plea agreement with counsel, he was satisfied with her advice, and he had not been forced to enter into the plea agreement. Lugo's claim that his plea was not voluntary because he was on medication during the change-of-plea hearing is similarly contradicted by his contemporaneous statement that he had not taken "any drugs or alcohol or prescription medication which would affect [his] ability to understand the proceedings." And the court was entitled to rely on Lugo's responses at the change-of-plea hearing in making its finding that he voluntarily entered into the plea agreement. *See State v. Djerf*, 191 Ariz. 583, ¶ 25, 959 P.2d 1274, 1283 (1998).

Representation at Hearing on Motion to Withdraw Plea

¶17 Finally, Lugo argues counsel's assistance was ineffective at the hearing on his motion to withdraw from the plea agreement, because that motion was based largely on his allegations that her representation had been inadequate at the time he entered into the plea agreement and she therefore "labored under ineffective assistance."[7] But, as

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substantive changes, *see id.* § 119, we refer in this decision to the current section numbers rather than those in effect at the time of the offense in this case.

[7]Below, Lugo argued counsel had a "conflict of interest." But, because he does not raise this argument in his petition for review, it is waived. *See* Ariz. R. Crim. P. 32.9(c) (petition for review to contain issues "decided by the trial court . . . which the defendant wishes to present to the appellate court for review").

noted above, to the extent Lugo's argument relates to claims of ineffective assistance of counsel unrelated to his plea agreement, they are waived. *See State v. Flores*, 218 Ariz. 407, ¶ 6, 188 P.3d 706, 708-09 (App. 2008). And, we have found his other claims without merit.

¶18 Nor are we persuaded that the trial court erred in denying Lugo's motion to terminate counsel without conducting an inquiry into the underlying facts pursuant to *State v. Torres*, 208 Ariz. 340, ¶ 7, 93 P.3d 1056, 1059 (2004). In *Torres*, our supreme court held the trial court abused its discretion by failing to inquire into a defendant's request for substitution of counsel, where the defendant had raised "a colorable claim that he had an irreconcilable conflict with his . . . counsel." *Id.* ¶ 9. Here, however, Lugo's attempt to withdraw from the plea agreement clearly was the basis for the alleged conflict. Indeed, Lugo argued the two issues in the same motion, and the hearing on that motion constituted sufficient inquiry pursuant to *Torres*.

Disposition

¶19 Lugo has not established the trial court abused its discretion when it dismissed his petition for post-conviction relief. *See Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d at 948. Thus, although we grant his petition for review, we deny relief.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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JOSEPH W. HOWARD, Chief Judge